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No. 85-1035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CROCKER NATIONAL BANK,

Appellant,

v.

PAUL PERDUE,

Appellee.

On Appeal from the Supreme Court of the State of California

AMICUS CURIAE BRIEF OF CHICAGO CLEARING HOUSE ASSOCIATION IN SUPPORT OF JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether States may regulate the reasonableness of the deposit account service charges that national banks assess against their customers, *despite* the contrary regulation of the Comptroller of the Currency and the terms and purposes of the National Bank Act and the Deregulation Acts of 1980 and 1982?

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With the consent of the parties, *amicus* Chicago Clearing House Association files this brief in support of the Jurisdictional Statement.[1] Amicus believes that review of the California Supreme Court's decision is a matter of great national importance and urges the Court to note probable jurisdiction.

INTEREST OF THE AMICUS CURIAE

Chicago Clearing House Association is an unincorporated association of banking institutions. Its members now consist of nine banks that have their principal places of business in Chicago,

[1]The letters granting these consents have been filed with the Clerk of the Court, pursuant to Rule 36.

Illinois: American National Bank and Trust Company of Chicago, Boulevard Bank National Association, Continental Illinois National Bank and Trust Company of Chicago, Drovers Bank of Chicago, Exchange National Bank of Chicago, The First National Bank of Chicago, Harris Trust and Savings Bank, LaSalle National Bank, and The Northern Trust Company. In addition, there are over 600 financial institutions that are affiliates of the Association.

The Chicago Clearing House's interest in this case goes beyond its status as a representative of banking institutions. Since its founding in 1865, the Clearing House has offered services permitting the daily exchanges and settlements of checks by its member institutions. Because this settlement function depends on safe banking practices, the Clearing House's mission was long ago expanded to the fostering of sound methods of banking. It has thus participated in public policy discussions, legislative proceedings, and, in some instances, judicial proceedings—all with a view to assuring the maintenance of sound methods of banking in the face of rapidly changing technology and regulations.

The Clearing House has a particular interest in whether probable jurisdiction is noted in this case. The decision of the California Supreme Court has created extraordinary uncertainty in the banking industry at a critical time in its history. Indeed, the experience of *amicus* and its members vividly demonstrates that until reviewed and set aside, the California Supreme Court's holding will have serious adverse effects on banking institutions and the nation. It will limit the ability of national banks to attract deposits, impair their efforts to deter abuses of their services, and impede the maintenance of safe and sound practices. *Amicus* thus urges the Court to resolve the conflicts among the lower courts now and determine the validity of the Comptroller's regulation in this case and at this time.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

In this case, the California Supreme Court invalidated a regulation of the Comptroller of the Currency that has great importance to the banking industry, the economy, and national policy. This regulation provides that, notwithstanding any contrary provision of state law, banks may establish fees for individual depositor account services on the basis of a number of factors. These include enhancement of the banks' competitive positions in attracting deposits, the deterrence of misuse of their services, and the maintenance of the safety and soundness of their institutions. The regulation further provides that these arrangements and fees are subject to the exclusive regulation of the Comptroller.

In invalidating the Comptroller's regulation, the California Supreme Court held that States have the authority to regulate the reasonableness of such charges and to order refunds of any amounts found to exceed the "true cost" of the service, plus a "reasonable profit." Under this decision, any individual deposit account fee that is deemed "excessive" by a customer can be subjected to a challenge, thereby subjecting the bank to potentially crippling refund obligations in a myriad of privately-instituted state court proceedings. The fee can further be declared unlawful, *regardless* of whether it adds to the bank's ability to gather deposits or promotes the other objectives that the Comptroller's regulation identified.

1. The California Supreme Court's decision directly burdens the exercise of important federal rights and creates extraordinary uncertainty at a critical time in the banking industry. Indeed, the experience of *amicus* and its members shows why review of this decision is a matter of paramount national importance.

The overriding fact is that the recent deregulation of the interest rates that banks may pay, and the intense competition from other kinds of financial institutions, has imposed great pressure

on banks to reprice their services. It requires banks to consider "unbundling," and charging separately, for many of the individual account services that historically were provided to customers for a single monthly fee. In many instances, the provision of the services had previously been subsidized by the below-market interest rates that banks had been required to pay; with the deregulation of interest rates, such subsidies are impossible. These efforts require that national banks have the flexibility that the Comptroller's regulation, and the pertinent federal statutes, afford. Indeed, the underlying purpose of the federal laws is that each bank should fashion its own pricing and marketing strategies so as to enhance its own safety, soundness, and ability to compete.

The experience of *amicus*'s members illustrates the point. A wide array of individual account services have been unbundled, to date, by some of the Chicago Clearing House's members. These services for which separate charges have been imposed include customer balance inquiries, preparation of cashiers checks, wire transfers of funds, preparation of duplicate statements, photocopying cancelled checks, holding statements for pick-up by customer, preparation of temporary checks, return of checks for insufficient funds, stop payments, and payments of overdrafts. The California Supreme Court's holding, by its terms, would affect each of the foregoing deposit account services. Plainly, a requirement that each fee be separately "cost-justified" would impede, if not prevent, any attempts to continue the unbundling of services.

Furthermore, contrary to the assumptions of the California Supreme Court (App. 11a, 36a n.43), there is also an enormous range in the amounts of fees that different institutions impose for the same services. For example, the fees that the Chicago Clearing House's members charge for the service at issue in this case—the processing of checks drawn on non-sufficient funds (NSFs)—range from $1 per item to $20 per item. The range in the fees reflects that different institutions have different market-

ing strategies and have given different weight to the Comptroller's other factors, in light of the unique circumstances of each institution. By way of example, a bank seeking to attract deposits from customers who seldom draw checks on insufficient funds (but use other services extensively) may establish very high NSF charges relative to both the "market" and the "true cost" of service; conversely, that bank might establish fees that are below the "market," and below cost, for other depositor services. In all events, the Comptroller regulates the reasonableness of the bank's practices.

The assurance of exclusive federal regulation under the Comptroller's flexible standards is critical to the continuation of these competitive efforts by banks to attract deposits and promote their safety and soundness. Quite plainly, the California Supreme Court's decision will end the competition among banks in setting individual fees. Because the ability to avoid lawsuits and crippling retroactive refund obligations would depend on the pricing of all services at "cost," any fees that are established would be set at cost regardless of whether different fee structures would better serve other banking objectives. Indeed, the California decision will inhibit any bank from establishing fees for *any* individual services; this is because of the obvious difficulties in "cost justifying" individual fees. Because the potential liabilities that California's holding creates are so great, moreover, the mere existence of the decision, correct or not, will have a direct effect on the ability of banks to "unbundle" services to promote their financial health and safety. Review of the decision is thus of the utmost national importance.

The importance of review is further accentuated by the fact that California's invalidation of the Comptroller's regulation has encouraged other kinds of state regulation of individual deposit account service fees. In the wake of the California decision, for example, Illinois passed a law that essentially prohibits the impo-

sition of returned deposited item charges ("RDI charges").[2] These are the fees that are imposed on a bank customer (*e.g.*, a merchant) who deposits a check that is drawn on a second bank, but the second bank dishonors the check and returns it. Each of *amicus*'s member banks had previously assessed such RDI charges. Indeed, these epitomize the fees that can deter abusive use of bank services (by giving merchants an added incentive to assure that checks they deposit will not be returned for non-sufficient funds[3]) and help assure the safety and soundness of the institutions. A national decision upholding the Comptroller's regulation would prevent this and other state interference with these important federal objectives.

2. There similarly is no question that the decision of the California Supreme Court in this case presents federal questions that are substantial as well as vitally important. Indeed, the decision squarely conflicts with the decision in *Jacobs* v. *Citibank, N.A.*, 61 N.Y.2d 869, 462 N.E.2d 1182, 474 N.Y.S.2d 464 (1984). There, the New York Court of Appeals held that under the National Bank Act, the regulation of the amount of a national bank's service charges is the exclusive province of the Comptroller of the Currency.

The California Supreme Court's decision also conflicts with this Court's earlier decisions construing the National Bank Act. This Court has held that the Congressional authorization of national banks to receive deposits and exercise "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. §24 (Seventh), preempts state prohibitions on promotional activities (such as advertising) that further the banks' efforts to attract deposits. *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954). As explained above, the California holding imposes, if anything, a greater burden on national banks' efforts

[2]Ill. Rev. Stat. ch. 26, §3-806 (P.A. 84-1002, October 30, 1985).

[3]If a merchant passes the RDI charges on to the drawer of the check—as many do—the incentives would be heightened further.

to market services and gather deposits. *See* p. 5, *supra*. Under any view, moreover, the power to charge for services rendered to depositors is necessary to carry on the business of banking and to attract deposits.

The decision in the instant case also conflicts with the terms and purposes of the National Bank Act in a second respect; it encroaches on the exclusive power and duty of the Comptroller of the Currency to enforce banking laws against national banks. Congress has given the Comptroller the authority to examine the operations of national banks not only to ensure compliance with applicable law, but, more importantly, to promote the safety and soundness of each institution. Yet the California decision permits state courts to review national bank pricing policies after those very policies have been examined and approved by the Comptroller. Such state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Indeed, in this instance, the state regulation, by its very terms, would conflict with specific regulatory policies of the Comptroller. By ordering that each service charge be individually cost-based, California would prevent the Comptroller from implementing its policies that service charges be set high enough to deter the writing of checks in amounts greater than account balances (*see Comptroller's Handbook For National Bank Examiners* §301.1 (1977); 12 C.F.R. 7.8000(b)(2)), and otherwise advance the deposit-gathering abilities or safety of the institutions. 12 C.F.R. 7.8000(b)(4). The California Supreme Court's decision places national banks in the untenable position of choosing between violating the provisions of the Comptroller's regulation or subjecting themselves to state court litigation with the risk of incurring enormous refund obligations.

Finally, the California Supreme Court's decision conflicts with the objectives of the Depository Institutions Deregulation and

Monetary Control Act of 1980, 12 U.S.C. §§3501 *et seq.*, and the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. §3503(c), which ended the limitations on interest rates payable by depository institutions, 12 U.S.C. §3501(b). In these Acts, Congress recognized that national banks could not pay these higher, competitive interest rates unless they also had the freedom to increase service charges that the California Supreme Court has denied them. *See* S.Rep. No. 368 at 39 (Sen. Cranston); S.Rep. No. 368 at 37-38 (Sen. Morgan); BNA, *Daily Rep.*, No. 3, Jan. 6, 1984 at A-10 (Rep. Annunzio).

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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